

Case No. 21-125

**IN THE
SUPREME COURT OF THE UNITED STATES**

OCTOBER TERM 2021

AUSTIN CODA,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

ON WRIT OF CERTIORARI
FROM THE UNITED STATES COURT OF APPEALS
FOR THE THIRTEENTH CIRCUIT

Brief for Petitioner Austin Coda

Team 2
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QUESTIONS PRESENTED

- I. Does preindictment delay that causes the accused actual prejudice violate the Fifth Amendment to the United States Constitution where the Government's delay in unsupported by an actual need for delay?
- II. Does punishing a legally innocent person for asserting their post-arrest, pre-*Miranda*, and pre-interrogation right to silence guaranteed by the Fifth Amendment violate the United States Constitution?

STATEMENT OF THE CASE

I. Statement of Facts

Austin Coda owned and operated his hardware store in Plainview, East Virginia, in January 2002. R. at 1. However, after the 2008 recession, Mr. Coda's business lost customers. *Id.* By 2010, Mr. Coda struggled to maintain the proper upkeep of the building. *Id.* On December 22, 2010, an explosion occurred at Mr. Coda's hardware store. R. at 2. Local fire investigators and agents from the Federal Bureau of Alcohol, Tobacco, and Firearms (ATF) opened an investigation into the cause of the explosion. *Id.* At the time, evidence suggested that cold weather caused an old, faulty gas line to leak and destroy the run-down building. *Id.*

Shortly after, the Federal Bureau of Investigation (FBI) received a tip from Sam Johnson, who claimed to have information relating to the destruction of Mr. Coda's business. *Id.* Johnson informed the FBI that Mr. Coda's business and personal finances were in decline, that Johnson knew Mr. Coda maintained an insurance policy that covered the store in case of a total loss, and that the week after the accident, Mr. Coda seemed "anxious and paranoid." *Id.* After receiving this information, the FBI believed that Mr. Coda might be responsible for the explosion and informed the United States Attorney's Office. *Id.* The U.S. Attorney's Office, however, experienced high turnover rates and political pressure to focus on cases involving drug trafficking and other related offenses. *Id.* Thus, Mr. Coda's case was marked as "low-priority" until April 2019, when the Assistant U.S. Attorney took over Mr. Coda's case within months of the statute of limitations. *Id.*

The government arrested Mr. Coda on April 23, 2019. R. at 7. Immediately after Mr. Coda's arrest, the FBI informed Mr. Coda of the charges against him. *Id.* Mr. Coda remained silent instead of asserting an alibi defense. *Id.* Subsequently, the FBI transported Mr. Coda to the detention facility, after which the agents read Mr. Coda his *Miranda* rights. *Id.*

The government indicted Mr. Coda under 18 U.S.C. § 844(i) in May 2019. R. at 3. The government sought to include Mr. Coda’s post-arrest but pre-*Miranda* silence as substantive evidence of Mr. Coda’s guilt because they claimed “any reasonable person with an alibi defense would have disclosed that defense to the [arresting] agent.” R. at 7. At Mr. Coda’s evidentiary hearing, Mr. Coda testified that he intended to raise an alibi defense at trial because he was in New York visiting family the night of the explosion. R. at 3 Mr. Coda’s alibi, however, could not be corroborated because four of his family members have died, his fifth family member was diagnosed with dementia and cannot remember if he visited New York the day of the explosion, and that he cannot produce his bus records because they are only stored online for three years. *Id.*

II. Procedural History

A. Trial Proceedings

Mr. Coda moved to dismiss the indictment and moved to suppress evidence of his post-arrest, pre-*Miranda* silence as substantive evidence of guilt. R. at 3; 7. The District Court denied both motions, arguing pre-indictment delay and post-arrest, pre-*Miranda* silence does not violate the Fifth Amendment. *Id.* Subsequently, Mr. Coda was convicted under 18 U.S.C. § 844(i) and sentenced to ten years in prison. R. at 11.

B. Appellate Proceedings

Mr. Coda appealed the denials of both motions to the thirteenth Circuit Court of Appeals while seeking to have his conviction overturned and charges dismissed. R. at 7. Instead of expanding upon the District Court’s analysis, the Circuit Court “adopted” the District Court’s analysis on both issues in full and affirmed Mr. Coda’s conviction. R. at 12. Mr. Coda petitioned this Court for review of the Thirteenth Circuit’s decision, and this Court granted certiorari on July 9, 2021. R. at 16.

SUMMARY OF THE ARGUMENT

This Court must find that the lower court improperly imposed the improper-motives test in their inquiry into Mr. Coda's due process violation. The improper-motive test is an inflexible test that contradicts this Court's jurisprudence on both pre- and post-indictment delay decisions. The improper-motive test requires legally innocent persons to offer proof of the government's subjective intent for having caused the delay. However, without smoking-gun evidence, akin to a prosecutor's confession, such evidence is impossible to offer. In Mr. Coda's case, the prosecution alleged that the delay was caused in part because Mr. Coda's case was of low priority. The prejudice caused because of this delay, overwhelms the government's reason for the delay. Mr. Coda had multiple alibis, however each one is now unavailable. Four of Mr. Coda's witnesses died before the indictment was brought, and a fifth was diagnosed with dementia and is no longer able to recall whether Mr. Coda was in New York on December 22, 2010. Mr. Coda's trips to New York were documented at the Greyhound company. However, after years of delay, Mr. Coda's records of trips to New York were deleted. Without witnesses and without evidence that Mr. Coda was in New York, the government is the only party in this case with any ounce of evidence.

This Court must also find that the use of Mr. Coda's post-arrest, pre-*Miranda* silence at trial as substantive evidence of guilt violated Mr. Coda's right to remain silent, as guaranteed by the Fifth Amendment's Self Incrimination Clause. The Self Incrimination Clause of the Fifth Amendment provides that "No person... shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law." While lower courts are split on whether the Fifth Amendment prevents the government from using post-arrest, pre-*Miranda*, and pre-interrogation silence as substantive evidence of guilt, this Court's

jurisprudence recognizes the origins of the privilege against self-incrimination. Mr. Coda is aware that anything he says post-arrest can and will be used against him in a court of law. Rather than provide more evidence for the prosecution, seeing as the aforementioned delay left Mr. Coda with no evidence, Mr. Coda exercised his right to remain silent. The long-standing tradition of the Fifth Amendment does not serve to punish legally innocent persons that rely upon their right to remain silent. However, by employing the “common sense standard,” as did the lower court, the government asks this court to punish every accused who so chooses to assert their constitutional rights.

STANDARD OF REVIEW

On a motion to dismiss for pre-indictment delay violating the Fifth Amendment, this Court reviews questions of constitutional law *de novo*. *Highmark Inc. v. Allcare Health Mgmt. Sys., Inc.*, 134 S. Ct. 1744, 1748 (2014). Similarly, on a motion to suppress evidence in violation of the Fifth Amendment, this Court reviews legal conclusions *de novo* and the district court’s factual findings for clear error. *Ornelas v. United States*, 517 U.S. 690, 691 (1996).

ARGUMENT

I. THIS COURT MUST DEFEND THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT BY BALANCING THE PARTICULAR PREJUDICE AGAINST MR. CODA AGAINST THE GOVERNMENT’S PURPOSE, OR LACK THEREOF, FOR THE DELAY.

This Court must not require Mr. Coda to prove the subjective intent of government actors in violation of the Due Process Clause of the Fifth Amendment. “No person shall... be deprived of life, liberty, or property, without due process of law.” U.S. Const. amend. V. Justice White of the United States Supreme Court recognized that the federal courts are in “continuing conflict” over “the correct test for determining if prosecutorial preindictment delay amounts to a violation of the Due Process Clause of the Fifth Amendment.” *Hoo v. United States*, 484 U.S. 1035, 1035-

1036 (1988)(White, J., dissenting from denial of certiorari). The general test accepted by nine circuits provides that a criminal defendant must show (1) that the prosecution's delay caused actual prejudice to their defense, and (2) that the delay occurred due to an "improper prosecutorial motive." *United States v. Marion*, 404 U.S. 307 (1971). However, "unlike some legal rules, due process is not a technical conception with a fixed content unrelated to time, place, and circumstances." *Mathews v. Eldridge*, 424 U.S. 319, 334 (1976). Due process "is flexible and calls for such procedural protections as the particular situation demands." *Id.*

The decision of the lower court and that of other courts that impose the "improper motive" test place legally innocent persons and their counsel in an unfair and untenable position. The present imbalance between citizens and the state creates an insurmountable discovery burden against legally innocent persons. The state has sole control over their subjective intent, and can change that narrative at any point throughout their investigation to provide further reasons for delay. The state's pre-indictment delay made Mr. Coda's ability to form a meaningful defense an impossible task. Any evidence Mr. Coda could have preserved for litigation is now unavailable or destroyed because Mr. Coda was not made aware he needed to prepare for litigation. Accordingly, Mr. Coda's conviction must be overturned and his charges dismissed.

A. The Decision Below Contradicts Long Standing Jurisprudence Used to Assess Whether Government Delays are Unconstitutional.

The Thirteenth Circuit's decision to use an inflexible approach to determine whether delays in the criminal process are unconstitutional contradicts this Court's Fifth and Sixth Amendment jurisprudence, which instead uses flexible balancing tests to determine whether government delays are unconstitutional. The lower courts must be instructed to abide by this Court's jurisprudence.

1. *Sixth Amendment jurisprudence warrants the use of flexible-balancing approaches to due process inquiries.*

This Court has adopted a flexible balancing test to determine whether *post-indictment* delay violated the Speedy Trial Clause of the Sixth Amendment. “The right to a speedy trial is a more vague concept than other procedural rights. It is... impossible to determine with precision when the right has been denied.” *Barker v. Wingo*, 407 U.S. 514, 521 (1972). Thus, “any inquiry into a speedy trial claim necessitates a functional analysis of the right in the particular context of the case. The right of a speedy trial is necessarily relative. It is consistent with delays and depends upon circumstances.” *Id* at 522.

In *Barker*, this Court “rejected... inflexible approaches” for determining Sixth Amendment speedy trial claims and “accepted a balancing test, in which the conduct of both the prosecution and the defendant are weighed,” and thus, “compelling courts to approach speedy trial cases on an *ad hoc* basis.” *Id.* at 529-30. This Court identified “factors which courts should assess in determining whether a particular defendant has been deprived of his right.” *Id.* at 530. Those factors include “length of delay, the reason for delay, the defendant’s assertion of his right, and the prejudice to the defendant.” *Ibid.* “Prejudice, of course, should be assessed in the light of the interests of defendants which the speedy trial right was designed to protect,” including, “to limit the possibility that the defense will be impaired,” which is, “the most serious... because the inability of the defendant adequately to prepare his case skews the fairness of the entire system.” *Id.* at 532. “If witnesses die or disappear during the delay, the prejudice is obvious. There is also prejudice if defense witnesses are unable to recall accurately events of the distant past. Loss of memory, however, is not always reflected in the record because what has been forgotten can rarely be shown.” *Ibid.*

2. *Fifth Amendment jurisprudence warrants the use of flexible-balancing approaches to due process inquiries.*

Outside the realm of the right to a speedy trial, this Court adopted a similar balancing test to determine whether delay in bringing forfeiture proceedings is unconstitutional. Post-seizure delay in filing forfeiture proceedings “mirrors the concern of undue delay encompassed in the right to a speedy trial.” *U.S. v. Eight Thousand Eight Hundred and Fifty Dollars (\$8,850) in U.S. Currency*, 461 U.S. 555, 564 (1983). While the Sixth Amendment Speedy Trial Clause was not implicated in the present case with Mr. Coda, this Court held that such delays could tarnish the Fifth Amendment’s Due Process Clause. *Ibid.* Thus, the test outlined in *Barker*, provided an appropriate framework for determining whether the government’s delay violated due process. *Ibid.* (internal quotations omitted). “[T]hese elements are guides in balancing the interests of the claimant and the government to assess whether the basic due process requirement of fairness has been satisfied in a particular case.” *Id.* at 565.

This same flexible approach should apply in all determination of whether pre-indictment delay violates due process.

3. *The flexible balancing approach applies to Mr. Coda’s case and this Court must dismiss the indictment in the interest of justice.*

The prosecution’s improper motives in delaying an indictment can be sufficient to establish a due process violation. However, this Court has never held that improper motive is *necessary*, nor has the Court rejected the flexible balancing approach it has adopted to assess delays in other contexts. While the Sixth Amendment does not apply to pre-indictment delays, “the Due Process Clause of the Fifth Amendment would require dismissal of the indictment if it were shown at trial that the pre-indictment delay in this case caused substantial prejudice to

appellee's rights to a fair trial and that the delay was an intentional device to gain tactical advantage over the accused." *U.S. v. Marion*, 404 U.S. 307, 324 (1971).

This Court did not hold that these were exclusive requirements and instead left it to the lower courts to "determine when and in what circumstances actual prejudice resulting from pre-accusation delays require the dismissal of the prosecution." *Ibid.* "To accommodate the sound administration of justice to the rights of the defendant to a fair trial will necessarily involve a delicate judgment based on the circumstances of each case... it would be unwise at this juncture to attempt to forecast our decision in such cases." *Id.* at 325.

This Court again dismissed an inflexible approach to the due process inquiry in *United States v. Lovasco*, 431 U.S. 783 (1977). In *Lovasco*, this Court rejected an argument that alleged preindictment delay. *Id.* at 789. "Proof of actual prejudice makes a due process claim concrete and ripe for adjudication, not that it makes the claim automatically valid." *Ibid.* This Court reasoned, "*Marion* makes clear that proof of prejudice is generally a necessary but not sufficient element of a due process claim, and that the due process inquiry must consider the reasons for the delay as well as the prejudice to the accused." *Id.* at 790. As such, this Court, like it had in *Marion*, left it to the lower courts to balance the "circumstances in which preaccusation delay would require dismissing prosecutions" under the Due Process Clause. *Lovasco*, 431 U.S. at 796.

The court below employed an inflexible test that contradicts the "flexible demands of due process." *Mathews*, 424 U.S. at 334. The trial court below erred in allowing the government in Mr. Coda's case to misrepresent this Court's *Lovasco* decision. R. at 4. The Fourth Circuit noted,

rather than establishing a black-letter test for determining unconstitutional preindictment delay, the Court [in *Lovasco*] examined the facts in conjunction with the basic due process inquiry: 'whether the action complained of... violated those 'fundamental conceptions of justice which lie at the base of our civil and political institutions'... and which define 'the community's sense of fair play and decency.'

Howell v. Barker, 904 F.2d. 889, 895 (4th. Cir. 1990). The Fourth Circuit rejected the improper-motives

test noting,

[t]aking this position to its logical conclusion would mean that no matter how egregious the prejudice to a defendant, and no matter how long the preindictment delay, if a defendant cannot prove improper prosecutorial motive, then no due process violation has occurred. This conclusion . . . would violate fundamental conceptions of justice, as well as the community's sense of fair play. Moreover, this conclusion does not contemplate the difficulty defendants either have encountered or will encounter in attempting to prove improper prosecutorial motive.

Id. Given the difficulties imposed on legally innocent persons by the rigid improper-motive test, we ask this Court to clarify its decision in *Lovasco*. Accordingly, we ask that this Court find that the balancing test is the appropriate test for the due process inquiry because this Court's long standing jurisprudence in the criminal process demands it in the interest of justice.

B. Requiring Mr. Coda to Prove the Government's Subject Motives While Facing Prosecution is Fundamentally Unfair Because of the Imbalance of Power Between Citizens and the State.

Mr. Coda suffered extreme prejudice to his defense because the prosecution unreasonably delayed filing charges against him. Courts that apply the "improper motive" test require proof that the government "intended to gain a tactical advantage or to advance some other impermissible purpose." *State v. King*, 165 A.3d 107, 113-114 (Vt. 2016). This test is "inflexible and imposes an insurmountable burden on criminal defendants, and is fundamentally in contrast with the flexible due process inquiry." *Mathews*, 424 U.S. at 334. Even if there was evidence of the government's motive, the "improper motive" requirement nonetheless imposes discovery burdens.

Without an admission from the government, Mr. Coda is left with no way to prove the subjective intent of the government. It is unlikely that a prosecutor will admit that they have impermissibly engaged in wrongful delay. Courts have thus recognized that the “improper motive” for preindictment delay “is nearly insurmountable.” *United States v. Rogers*, 118 F3d 466, 477 n.10 (6th Cir. 1997). This Court has acknowledged that while the government’s intent may be easy to allege, it is hard to disprove. *Crawford-El v. Britton*, 523 U.S. 574, 584-85 (1998) (internal quotation marks omitted). This Court has also consistently rejected other tests that would require an inquiry into the subjective intent of the government.

Within the context of the Fourth Amendment, this Court has said in dicta, that an inquiry into the subjective intent of police officers is a “fruitless misallocation of judicial resources.” *Com. Massachusetts v. Painten*, 389 U.S. 560 (1968). More firmly, this Court eliminated the subjective intent component public officials had under qualified immunity in suits for damages alleging deprivation of constitutional liberties. *Harlow v. Fitzgerald*, 457 U.S. 800 (1982). To determine when an accused’s right to counsel attaches, this Court rejected a test where the accused’s right to counsel attached when the prosecutor became aware, or involved in, the State’s “commitment to prosecute” because “determining the moment of a prosecutor’s first involvement would be wholly unworkable and impossible to administer.” *Rothgery v. Gillespie County, Texas*, 554 U.S. 191, 206-7 (2008).

Mr. Coda cannot prove the subjective intent of the state because Mr. Coda does not have access to the inner workings of the prosecution. The prosecution alleged that the pre-indictment delay was caused by Mr. Coda’s case not being of high priority. R. at 2. Mr. Coda was in New York on December 22, 2010. R. at 3. However, Mr. Coda is burdened with providing evidence to prove that he was in fact in New York on December 22, 2010 while the lower court simply took

the government's reason for delay as truth without the need of evidence. Mr. Coda isn't able to contest the political pressure placed against his case because he would have no way to understand what political pressure the U.S. Attorney's office was facing, if at all. Mr. Coda is also unable to contest whether facing two indictments would have made each proceeding "inconvenient" as the prosecution alleged. R at 2. Accordingly, the reasons for delay provided by the prosecution are based on unsupported assumptions.

Given that this Court has consistently rejected tests like the one challenged here, Mr. Coda asks to not be required to prove the State's subjective intent because, in doing so, every legally innocent person will continue to go through fruitless discovery in hopes of remedying the government's prejudice against them.

C. Intense Pre-indictment Delay can Make it Impossible to Form A Meaningful Defense, and is Enough to Warrant Dismissal of Criminal Complaints.

This Court must overturn Mr. Coda's conviction and dismiss all charges because the prosecution has made building a defense an impossible task. "The passage of time by itself... may dangerously reduce [a defendant's] capacity to counter the prosecution's charges. Witnesses and physical evidence may be lost; the defendant may be unable to obtain witnesses and physical evidence yet available. [Their] own memory and the memories of his witnesses may fade."

Dickey v. Florida, 398 U.S. 30, 42 (1970).

This cannot be truer in Mr. Coda's case. The prosecution's unexplainable delay has left Mr. Coda without a defense because Mr. Coda's witnesses have either all died or have lost their memory. Records of Mr. Coda's trips to New York were also deleted by the travel agency. Thus, Mr. Coda has no viable evidence to prove his alibi because the prosecution unreasonably delayed bringing forth the indictment.

1. *Most of Mr. Coda's witnesses have died since the prosecution's delay.*

The “passage of time, whether before or after arrest... [can] deprive the defendant of witnesses.” *United States v. Marion*, 404 U.S. 307 (1971). “The prejudice is clear where witnesses have either died or disappeared during the prosecution’s delay.” *Barker v. Wingo*, 407 U.S. 514, 532 (1972). The unavailability of Mr. Coda’s witnesses hindered Mr. Coda’s only viable defense. Mr. Coda was out of the state when his hardware store was destroyed, and the prosecution’s delay prevented Mr. Coda’s witnesses from confirming his alibi. R. at 3.

Since the December 22, 2010 incident, 4 out of the 5 alibi witnesses Mr. Coda intended to call for his defense died. R. at 3. Two witnesses died of chronic disease, one in 2015 and the other in 2017. Later, two witnesses died in a car accident in 2018. *Id.* These four witnesses supported Mr. Coda’s claim that every year on his birthday, December 22, he visits New York, proving Mr. Coda could not have caused the explosion at his hardware store. However, these witnesses were unable to provide an alibi because the prosecution unreasonably delayed filing the indictment.

2. *Mr. Coda's only living witness is unable to remember anything about the night of the alleged act, and thus is unable to aid in Mr. Coda's defense.*

When a legally innocent person’s alibi witness is unable to recall past events it is likely to be unduly prejudicial to their defense with little to no impairment to the prosecution’s case. In fact, such an impairment benefits the prosecution. “If during the delay, the Government’s case is already in its hands, the balance of advantage shifts more in favor of the Government the more the Government lags.” *Marion*, 404 U.S. at 331. While a mere loss of a witness’s memory is insufficient, prejudice is clear where that witness’s testimony “would have actually aided the defense.” *United States v. Beszborn*, 21 F.3d 62, 66 (5th Cir. 1994). Moreover, to establish

prejudice based on a witness's lost memories, it must be shown that "the information... could not otherwise be obtained from other sources." *Id.* at 67.

Mr. Coda's only living witness is unable to aid Mr. Coda's defense because the witness was diagnosed with dementia. R. at 3. While the record is unclear about when this witness was diagnosed with dementia, the witness would have testified had the prosecution not unreasonably delayed filing the charges against Mr. Coda. As the only remaining witness that could have provided Mr. Coda's alibi, this alibi cannot be obtained from any other source. Thus, the Government's delay in filing the indictment caused Mr. Coda's defense prejudice.

3. *The Greyhound company deleted all of Mr. Coda's records showing he was in fact in New York on December 22, 2010.*

Mr. Coda documented his travels to New York each year through Greyhound's company record. R. at 3. However, Greyhound's practice of deleting these records after only three years has left Mr. Coda with no way to show that he was in New York on December 22, 2010. While Mr. Coda does not allege that the government should have known of Greyhound's practice of deleting records, Mr. Coda urges this Court to hold that the government should not rely on third parties, or on Mr. Coda, to keep records in preparation for litigation that they have not been made aware of.

Mr. Coda would have a personal record of his Greyhound trips to New York had the government made Mr. Coda aware of the potential litigation. The government's unreasonable delay has thus prevented Mr. Coda from conducting proper discovery in his case. Accordingly, Mr. Coda's conviction must be overturned and his charges dismissed.

II. ADMISSION OF AN ACCUSED’S POST-ARREST, PRE-MIRANDA, AND PRE-INTERROGATION SILENCE AS SUBSTANTIVE EVIDENCE OF GUILT VIOLATES THE FIFTH AMENDMENT BECAUSE THIS COURT PROHIBITS IMPOSING A PENALTY ON A PERSON’S RELIANCE UPON THEIR CONSTITUTIONAL RIGHTS.

The Fifth Amendment provides that “No person . . . shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law.” U.S. Const. amend. V. Circuit courts, however, are currently split on whether the Fifth Amendment prevents the government from using post-arrest, pre-*Miranda*, and pre-interrogation silence as substantive evidence of guilt. R. at 8. In the present case, recognizing the right to remain silent is more aligned with this Court’s jurisprudence regarding the privilege against self-incrimination. Protection under the privilege against self-incrimination would prevent prosecutors from using post-arrest, pre-*Miranda*, and pre-interrogation silence as substantive evidence against a legally innocent person. However, even if this Court does not hold that the privilege against self-incrimination is implicated, a criminal defendant’s Fifth Amendment right to due process would be violated by the introduction of post-arrest, pre-*Miranda*, and pre-interrogation silence at trial.

First, Mr. Coda’s Fifth Amendment rights were violated when his post-arrest, pre-*Miranda*, and pre-interrogation silence was used against him as substantive evidence of guilt at trial. Although the Government attempts to justify the inclusion of Mr. Coda’s silence by extending the holding of *Salinas v. Texas*, *Salinas*’ reasoning is inapplicable in the absence of voluntary statements or questioning. *Salinas v. Texas*, 570 U.S. 178, 186–91 (2013). Second, the District Court failed to exclude Mr. Coda’s silence from trial without analyzing whether the fundamentals of fairness from due process were violated. Finally, adopting the District Court’s holding would require legally innocent defendants to profess their innocence immediately upon

arrest, or suffer the consequence of having their silence used against them at trial. Therefore, Mr. Coda seeks to have his conviction overturned and charges dismissed on the basis that he was deprived of his constitutional rights.

A. The Fifth Amendment Privilege Against Self-incrimination Naturally Attaches to the Accused's Post-arrest, *Pre-Miranda*, and Pre-interrogation Silence.

The plain meaning of the Fifth Amendment privilege against self-incrimination is to ensure that legally innocent persons are free from testimonial compulsion. The Fifth Amendment naturally attaches to the accused post-arrest, pre-*Miranda*, and pre-interrogation silence when prosecutors use that silence at trial as substantive evidence of guilt because defendants are compelled to be a witness against themselves in a criminal case.

First, Mr. Coda's privilege against self-incrimination was violated despite the history of broadly applying the privilege to a criminal case. Second, Mr. Coda's privilege was violated when the District Court erred by not applying this Court's jurisprudence, and following the majority of federal circuit court decisions. Third, even if this Court applies the holding of *Salinas* to this case, Mr. Coda's privilege was violated because his silence falls within an exception cited in *Salinas*. *Salinas*, 570 U.S. at 178.

1. *The history of the ratification of the Fifth Amendment supports attachment of the right against self-incrimination to post-arrest but pre-Miranda and pre-interrogation silence.*

The Fifth Amendment was drafted in direct response to the English Common Law practice of holding criminal suspects guilty of perjury when they refused to answer questions before an "Examiner." Levy, *Origins of the Fifth Amendment*, MacMillan, London, 1986 at 43-82. After the Fifth Amendment was ratified, most states held that criminal defendants were automatically deemed incompetent to stand trial and thus were not allowed to appear as witnesses for or against themselves. Levy, *Original Intent and the Framers of the Constitution*,

Macmillan, London, 1988 at 248; see also Plucknett, *A Concise History of the Common Law*, 5th Edition, Little Brown, 1956, 437. The Supreme Court did not weigh in on this issue until *Ferguson v. Georgia*, 365 U.S. 570 (1961), when the Court ultimately held that laws prohibiting defendants from testifying at trial were unconstitutional.

The Fifth Amendment privilege against self-incrimination was intended to protect more than a defendant's right at trial. The self-incrimination clause was initially incorporated into the Sixth Amendment. Levy, *supra* at 426. The self-incrimination clause, however, was moved to the Fifth Amendment for the final draft. *Id.* The Sixth Amendment right to counsel applies narrowly to "criminal prosecutions" of the accused whereas the language of the Fifth Amendment is broader, applying to "any criminal case." *Id.* This Court, long ago, affirmed that a criminal case can occur before formal, judicial adversarial proceedings have commenced. *Counselman v. Hitchcock*, 142 U.S. 547, 563 (1892). Thus, moving the self-incrimination clause from the Sixth Amendment post indictment and into the Fifth Amendment to a "criminal case" shows the Framers' intent to not limit the application of the self-incrimination clause to strictly trial proceedings. Levy, *supra* at 426.

In the present case, Mr. Coda's privilege against self-incrimination applied at the moment of his arrest. When a person is arrested, a criminal case begins against the person because the state has now restricted their freedom of movement in a significant way. Furthermore, when an arresting agent lists charges against a person, the government audibly informs the arrestee that the state is adverse to their position. When Mr. Coda was arrested, the FBI agent listed the charges against him. R. at 7. The arrest, along with the reading of charges, put Mr. Coda on notice that the government was adverse to his interests. Thus, any silence derived from the

moment of his arrest and up until his *Miranda* rights were read to him, is privileged because the criminal case began when Mr. Coda remained silent.

While the government heavily relies upon the express invocation requirement of the Fifth Amendment, it is important to distinguish that the Framers of the Constitution intended to protect criminal defendants from inferring guilt from silence. Not only did Mr. Coda remain silent at his arrest, his silence was directly used against him at trial. R. at 7. Juxtaposed to the English Common Law practice of holding defendants guilty of perjury for refusing to answer questions, Mr. Coda's silence was used by the government to find him guilty of the charges against him. Therefore, when the government relies upon a criminal defendant's silence to prove guilt, the practice goes against the Framers' intention of shielding defendants from *any* adverse inferences of guilt when the defendant relies upon the privilege of self-incrimination.

2. *This Court and the majority of federal circuit court jurisprudence supports a finding that the right against self-incrimination attaches to post-arrest, pre-Miranda, and pre-interrogation silence.*

“No person shall suffer a penalty for exercising their right to remain silent.” *Malloy v. Hogan*, 378 U.S. 1, 14 (1964). In *Malloy*, the petitioner was compelled to testify at a state evidentiary hearing, but he remained silent throughout the questioning and was held in contempt until he answered the questions. *Id.* at 3. While *Malloy* solidified that the Fifth Amendment privilege against self-incrimination applied to state level prosecutions; this Court still recognized “the right of a person to remain silent unless he chooses to speak is the unfettered exercise of his own will, and to suffer no penalty for such silence.” *Id.* at 14. A year later, this Court reaffirmed the same principle that the Fifth Amendment privilege against self-incrimination was violated when the prosecutor's comment on the criminal defendant's silence imposed a "penalty ... for exercising a constitutional privilege.” *Griffin v. California*, 380 U.S. 609, 614 (1965).

A criminal defendant must assert the privilege against self-incrimination when faced with questions that might elicit an incriminating response. *Minnesota v. Murphy*, 465 U.S. 420, 429 (1984). In *Murphy*, the petitioner made voluntary statements to his probation officer in a non-custodial setting, and the Court determined the privilege against self-incrimination did not apply. *Id.* at 423. This Court reaffirmed that the Fifth Amendment is not self-executing in the face of non-custodial interrogation. *Id.* at 428. However, this Court recognized the general rule that the privilege against self-incrimination must not be self-executed where the assertion of the privilege is penalized “so as to foreclose a free choice to remain silent and compel incriminating testimony.” *Id.* at 434. Therefore, if a criminal defendant is faced with some form of compulsion where speaking would result in self-incrimination, the defendant may remain silent.

The East Virginia District Court erred when it failed to consider the majority of the federal circuit court jurisprudence that hold the right to remain silent applies to post-arrest, silence. The First, Second, and Seventh Circuits have independently held that using a legally innocent person’s post-arrest, pre-*Miranda* silence as substantive evidence of guilt violates the Fifth Amendment. *Coppola v. Powell*, 878 F.2d 1562, 1565 (1st Cir. 1989); *United States v. Okatan*, 728 F.3d 111, 118 (2d Cir. 2013); *United States v. Hernandez*, 948 F.2d 316, 321-24 (7th Cir. 1991). While these three circuit cases have slightly different facts, the Fifth Amendment analysis was similar: non-custodial silence is impermissible to presume guilt because the right to remain silent may attach before any formal, judicial adversarial proceedings have initiated against a person. *Hernandez*, 948 F.2d at 321. Furthermore, these cases highlighted the prejudicial nature of an express invocation requirement for pre-*Miranda* silence because the negative inference may be used when the prosecution’s case is weak against a legally innocent

person. *Powell*, 878 F.2d at 1566. Lastly, the decisions from the Ninth and D.C. Circuit courts are most analogous to the present case with Mr. Coda.

In the Ninth Circuit, the court held the use of post-arrest silence clearly infringed upon the defendant's privilege against self-incrimination. *United States v. Velarde-Gomez*, 269 F.3d 1023, 1026 (9th Cir. 2001). In *Velarde-Gomez*, at the defendant's trial, the arresting officer testified that when he arrested and informed the defendant that there were drugs in the car, the arresting officer observed that the defendant remained silent and didn't look upset or concerned. *Id.* at 1027. The court, along with the prosecutor, acknowledged that there was no direct evidence to show whether the defendant had knowledge or intent to distribute the drugs. *Id.* However, this did not stop the prosecutor from making the following negative inference from the defendant's silence at arrest,

Now, if someone is told that they have no idea that there's marijuana in their car, if someone is told we've pulled you over, checked out your car, and we found 63 pounds of marijuana in your car, was he shocked? Was he surprised? Was he enraged? No. He showed no emotion at all. He was able to control any feelings he might have had. He was the perfect guy. He was the perfect guy to bring drugs across the border. He's the kind of guy a drug organization looks for and hires.

Id. at 1028. The Ninth Circuit determined that given the weak nature of the prosecution's case-in-chief, the government did not survive the harmless error review because the negative inference was highly ambiguous of guilt and the jury weighed the prosecutor's inference significantly in their decision to determine guilt. *Id.* at 1030. Therefore, when prosecutors heavily rely upon a legally innocent person's post-arrest silence, it violates the Fifth Amendment privilege against self-incrimination because their silence is used against them at trial. *Id.*

In the D.C. Circuit, the court held that custody, not custodial interrogation, is the trigger that activates the Fifth Amendment right to silence. *United States v. Moore*, 104 F.3d 377, 385 (D.C. Cir. 1997). In *Moore*, the defendant's post-arrest, pre-*Miranda* silence was used against him at trial when the prosecutor confirmed with the arresting officer that the defendant stood silent. *Id.* at 380. The court directly stated that it "cannot be the case that a citizen's protection against self-incrimination only attaches when officers recite a certain litany of his rights." *Id.* at 386. The fear of allowing post-arrest silence to be used as substantive evidence of guilt is that it does create an incentive for police officers to manufacture silence in order to be used against the defendant at trial. *Id.* Therefore, using silence against a defendant would violate the privilege against self-incrimination from those that did not make any voluntary statements to the police after custody.

In the present case, Mr. Coda reasonably relied upon his right to remain silent during his arrest. The record is clear that Mr. Coda did not audibly inform the arresting agent of his intent to remain silent. R. at 7. However, Mr. Coda did not assert his right to remain silent because he would have suffered a penalty by asserting an uncorroborated, alibi defense. In fact, making any statements prior to *Miranda* warnings is incredibly detrimental to a criminal defendant's case because those statements will be used by the government against the defendant at trial. Furthermore, Mr. Coda had no duty to participate or aid in the prosecution's case in chief, because it was the government's burden to prove every aspect of the charges listed against him. Thus, Mr. Coda's decision to remain silent at his arrest is consistent with the fact that he would have suffered a penalty for asserting his defense, and that he had no duty to aid the prosecution in their case against him.

While the government relies upon the District Court's conclusion that Mr. Coda did not present facts sufficient to show governmental coercion as an excuse for Mr. Coda not putting the government on notice, the issue is about whether Mr. Coda would have suffered a penalty for making any statements to the arresting officer. R. at 9. Generally, Americans know that the first sentence of a *Miranda* warning includes the statement, "you have the right to remain silent." Any reasonable person would understand, even prior to receipt of *Miranda* warnings, that they have a right to not say anything to the police.

Therefore, if Mr. Coda had done what the District Court suggested, such as asserting an alibi defense at arrest, he would have absolutely suffered a penalty at trial because his statements would have ultimately been used against him as substantive evidence.

3. *The District Court's use of a "common sense" standard for post-arrest, pre-Miranda, and pre-interrogation silence is inconsistent with the holdings of Salinas and the Fourth Circuit Court.*

The main holding of *Salinas v. Texas* has made it abundantly clear that, as a general rule, criminal defendants that wish to enjoy Fifth Amendment protections must affirmatively invoke their privileges. 570 U.S. 178, 183-84 (2013). The rationale for the express invocation is that it ensures the courts have a "contemporaneous record establishing the witness' reasons for *refusing to answer*." *Id.* (emphasis added). The invocation requirement has never stood for establishing the reasons for a witness who stands mute when no questions, statements, or comments were made to a criminal defendant at the moment of their arrest.

Furthermore, even if the express invocation requirement were controlling in situations where a defendant stands mute at arrest, there is an exception to the rule where "assertion of the privilege would itself tend to incriminate." *Id.* at 185. In such circumstances, the defendant is allowed to remain silent and any failure to expressly invoke the privilege is not detrimental to

exercising their right. As an example, the Court provided a case illustration where there is “no requirement that a taxpayer complete a tax form where doing so would have revealed income from illegal activities.” *Id.* Citing *Leary v. United States*, 395 U.S. 6, 28-29 (1969). While failing to fill out a form is an act of omission, it's akin to silence because no testimony was spoken and recorded for the courts.

Misguidedly, the District Court relied upon the language of *United States v. Love* to determine whether a jury may consider a police officer’s “common-sense perceptions” such as a criminal defendant’s silence post-arrest to determine guilt. R. at 9. In *Love*, the petitioner was stopped by a police officer and was told he may leave the scene if he could tell the officer he was not involved in a drug trafficking scheme. *United States v. Love*, 767 F.2d 1052, 1063 (4th Cir. 1985). Instead of incriminating himself in a noncustodial setting, the petitioner chose to remain silent. *Id.* The court held that since Love did not receive *Miranda* warnings at his arrest, his statements were not protected by the Fifth Amendment. In arriving at this conclusion, however, the court largely relied upon the decision of *Fletcher v. Weir*. *Id.* The main holding in *Fletcher* is that pre-*Miranda* silence may be used against the defendant for impeachment purposes only, not substantive evidence of guilt. *Fletcher v. Weir*, 455 U.S. 603, 608 (1982).

Furthermore, the government relies upon the holding of *United States v. Frazier* to justify the use of post-arrest, pre-*Miranda* silence as substantive evidence of guilt because that court claimed there is no official compulsion to speak at this stage of a criminal case. *United States v. Frazier*, 394 F.3d 612, 620 (8th Cir. 2005). However, within the same paragraph, the court decided that their decision was not dispositive of “whether compulsion may exist under other post-arrest, pre-*Miranda* circumstances.” *Id.* Thus, even the Eighth Circuit recognized that there

may be general exceptions to the rule where a criminal defendant would be compelled to remain silent immediately upon arrest.

In the present case, Mr. Coda did not refuse to answer any questions, he simply remained silent in the face of arrest and charges listed off against him. R. at 7. There was no need for the government to be put on notice that Mr. Coda intended to rely upon his right to silence because he did not refuse to answer any questions. Additionally, Mr. Coda remained silent because asserting an uncorroborated alibi defense would result in his statements being used against him at trial. Prosecutors and defense attorneys alike will use an uncorroborated alibi against a witness because it can be used to disprove theories, attack veracity, and infer guilt or innocence. Despite the District Court concluding that Mr. Coda did not have an alibi defense at his arrest, and that juries should consider his silence as guilt, the court conveniently dismisses the fact that if Mr. Coda had asserted his uncorroborated alibi defense at his arrest, his statements would have been used against him. R. at 9. Thus, any reasonable person, in that similar situation, would remain silent to avoid making any statements that may be later used against them at trial.

Not only was Mr. Coda under formal arrest, his silence was used as substantive evidence against him at trial despite never taking the stand. If Mr. Coda had taken the stand at trial, then his pre-*Miranda* silence would have been fair to be used against him; however, he never subjected himself to cross-examination. R. at 11. Even though juries are allowed to consider all relevant facts and circumstances relating to the arrest, inferring guilt from silence is not part of any officer's "common-sense" impressions.

B. Mr. Coda's Fifth Amendment Right to Due Process of Law was Violated When his Silence was Used Against him at Trial.

Even if this Court holds that *Salinas* controls and Mr. Coda failed to invoke his Fifth Amendment right to silence pre-*Miranda*, the District Court erred when they allowed the prosecutor's comment to be introduced against a defendant that never stood trial. R. at 7. To determine whether a defendant has been deprived of due process, this Court must consider whether the ideals of "fundamental fairness and common decency" have been violated. *Breithaupt v. Abram*, 352 U.S. 432, 435-36 (1957). In the present case, the Court must consider whether the use of Mr. Coda's post-arrest, pre-*Miranda* silence as direct, substantive evidence of guilt deprived him of the fundamental fairness guaranteed by Due Process of law.

Prosecutors may not ask the jury to connect a criminal defendant's post-arrest silence as substantive evidence of guilt. *Doyle v. Ohio*, 426 U.S. 610, 619 (1976). In *Doyle*, the petitioners were given *Miranda* warnings after they were arrested and only revealed an exculpatory story at trial. *Id.* at 612. The prosecutor impeached the petitioners and asked the jury to draw an inference of guilt because the petitioners did not tell the exculpatory story to the arresting officers. *Id.* at 613. This Court rejected the State's inference because silence after arrest "may be nothing more than the arrestee's exercise of these *Miranda* rights." *Id.* at 617. Furthermore, every "*post-arrest silence* is insolubly ambiguous" and the inclusion of such silence as evidence of guilt violates a defendant's Fifth Amendment right to Due Process. *Id.* (emphasis added). Therefore, even in cross-examination, it is impermissible for prosecutors to suggest guilt from silence post-arrest.

Silence gains significant probative value when it "persists in the face of accusation" because the courts presume the accused would dispute a false accusation. *United States v. Hale*, 422 U.S. 171, 176 (1975). Strikingly similar to the present case with Mr. Coda, the respondent in

Hale was asked by the prosecutor in cross-examination about his failure to provide an alibi shortly after arrest. *Id.* at 172. Despite the trial court’s instructions to have the jury disregard the comment, this Court expressly held that the “probative value of respondent's pretrial silence in this case was outweighed by the prejudicial impact of admitting it into evidence.” *Id.* This Court stated that the danger of allowing the jury to hear such arguments risks the jury from assigning more weight to the defendant's previous silence than is warranted. *Id.* at 180. Furthermore, since there are many reasons for a defendant’s silence post arrest ranging from confusion to the desire to not incriminate themselves, it is highly suggestive to infer any express reason behind their silence. Thus, permitting the defendant to explain the reasons for his silence, even after *Miranda* warnings, is unlikely to overcome the “strong negative inference” that the jury is likely to draw from the defendant remaining silent at the time of their arrest. *Id.*

Mr. Coda’s Fifth Amendment right to due process was violated when the prosecutor introduced his post-arrest silence against him at trial. Similarly to *Doyle*, the prosecutor in this case asked the jury to draw a direct inference of guilt from Mr. Coda’s silence. R. at 11. The District Court failed to recognize that Mr. Coda’s silence was so ambiguous that it should not have been used against him. As mentioned previously, Mr. Coda had an alibi defense; however, he refrained from speaking to the arresting officer because Mr. Coda’s alibi could not be corroborated. Furthermore, even if Mr. Coda had not revealed his intent on asserting an alibi defense in the evidentiary hearing, there are a myriad of other reasons that resulted in his silence from anxiety of being charged nearly ten years after an alleged incident to general stress of an arrest.

There was no probative value of Mr. Coda’s brief, momentary silence after he was arrested. The facts from the record are indicative of an extraordinary brief silence between Mr.

Coda's arrest and receipt of *Miranda* warnings. The arresting agent merely read the charges against him at his arrest. There were no accusations accosted at Mr. Coda, there were no inferences or statements to suggest innocence or guilt, and there was no formal interrogation. The probative value of Mr. Coda's silence is so negligible, that it significantly outweighed the prejudicial effect it had on him at trial.

While the District Court and the government have continually argued Mr. Coda's silence was not dispositive to prove their case-in-chief, this Court's fears of an overwhelming prejudicial effect were actualized. The record is not clear as to whether Mr. Coda attempted to explain his silence to the jury after it was introduced against him at trial. Regardless, this Court made it abundantly clear that even if Mr. Coda explained his reasons for remaining silent, it would be highly unlikely that those reasons would overcome the "strong negative inference" that the jury would likely draw as a result of the prosecutor's comments. Therefore, any reference to pretrial silence, even before *Miranda* warnings were offered to the criminal defendant, must not be allowed against the defendant in the prosecutor's case-in-chief.

C. As a Matter of Policy, Allowing Post-arrest, Pre-Miranda, and Pre-interrogation Silence as Substantive Evidence of Guilt Would Require Legally Innocent Persons to Assert Their Innocence Immediately Upon Arrest, or Suffer an Inference of Guilt From their Silence.

Adopting the District Court's analysis would place legally innocent persons in an impossible situation when placed under arrest: assert their innocence, or suffer from a prosecutor using that silence against them as substantive evidence at trial. At Common Law, when a legally innocent person remains silent when they hear an accusatory statement, the legally innocent person is said to "adopt" the statement. Hermann and Speer, *Standing Mute at Arrest as Evidence of Guilt: The "Right to Silence" Under Attack*, 35 Am. J. Crim. L. 1, 6. Essentially, when a legally innocent person fails to speak up against an accusatory statement, the legally innocent

person “adopts” the statement as their own. *Id.* The problem with the District Court’s analysis is that it forces the legally innocent person to “adopt” their pure silence as a statement against themselves.

For example, in *Whitehead*, the prosecutor argued that the defendant’s silence post-arrest was indicative of guilt. *United States v. Whitehead*, 200 F.3d 634, 637-39 (9th Cir. 2000). The prosecutor expanded on this idea to the jury by implying that any innocent person would immediately start professing their innocence, questioning why they were under arrest, why they were being treated this way, and any failure to do so means the defendant knows they are guilty of the charges against them. *Id.* This line of reasoning goes against this Court’s jurisprudence that has given a litany of reasons why a legally innocent person might be silent at the moment of arrest ranging from overwhelming anxiety to fear of incriminating themselves without an attorney present. *United States v. Hale*, 422 U.S. 171, 176 (1975)

Thus, if this Court adopts this direct inference of guilt from pure silence, there wouldn’t be any need for police to manufacture silence. The prosecutor can use *any* moment of silence and ask the jury to draw a direct inference of guilt from such silence. Therefore, this approach would be highly detrimental to this Court’s jurisprudence of recognizing the myriad of reasons to remain silent once arrested, and place a nearly impossible, unprecedented burden on legally innocent persons to make “voluntary” statements to the police.

CONCLUSION

Because the Fifth Amendment provides that all people, like Mr. Coda, are owed Due Process of the Law when prosecutorial preindictment delay causes prejudice to a legally innocent person, this Court should reverse the Thirteenth Circuit’s decision, overturn Mr. Coda’s

conviction, and have all charges dismissed. Additionally, the use of Mr. Coda's post-arrest, pre-*Miranda*, pre-interrogation silence as substantive evidence of guilt violates the fundamental principles of due process and the origins of the privilege against self-incrimination owed to a legally innocent person by the Fifth Amendment, thus this Court should reverse the Thirteenth Circuits decision and overturn Mr. Coda's conviction.

Respectfully Submitted,

Team 2,
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